

UNITED STATES OF AMERICA

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DEPARTMENT OF TRANSPORTATION

SURFACE TRANSPORTATION BOARD

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VOTING CONFERENCE

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FRIDAY,

JANUARY 31, 2003

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The conference commenced at 10:00 a.m. in the Linda J. Morgan Hearing Room, Room 760, of the Surface Transportation Board's headquarters, Mercury Building, 1925 K Street, N.W., Washington, D.C., Roger Nober, Chairman, presiding.

PRESENT:

ROGER NOBER, Chairman

WAYNE BURKES, Vice Chairman

LINDA J. MORGAN, Commissioner

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P-R-O-C-E-E-D-I-N-G-S

10:05 A.M.

CHAIRMAN NOBER: Well, good morning. The meeting will come to order. Well, thank you all for coming on a rainy day and snowy morning.

Today, the Surface Transportation Board is going to hold its first public voting conference since 1996. It's a significant event for me, since it's the first public event that I've presided over since I became Chairman of the STB.

Now of course, it's given me an opportunity to reflect on my two months as Chairman of the Board and I've come to the conclusion that without a doubt Commissioner Morgan is still the finest Chairman in the history of the Board.

(Applause.)

COMMISSIONER MORGAN: As I've been the only one until now, it's kind of easy, isn't it?

(Laughter.)

It's not much competition until now. Thank you, that's very kind.

CHAIRMAN NOBER: Well, I'm holding this

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1 voting conference this morning because I believe that
2 our Agency, like all Government agencies, should do
3 its business in public whenever possible.

4 Now for the first time in many years, we
5 have a full complement of Commissioners which, of
6 course, gives us the opportunity to return to the
7 Agency tradition. Now while today is the first of our
8 voting conferences, it is my intention that it not be
9 our last, and what we'll hold them periodically and
10 when circumstances and schedule and the press of
11 business warrant.

12 Now I'd like to just take a moment to
13 thank Vice Chairman Burkes and Commissioner Morgan for
14 their help and cooperation in setting this up. It was
15 a joint decision to hold this voting conference. It
16 was a joint decision to schedule it and the cases that
17 are on the agenda were arrived at jointly as well.
18 And I thank them for their hard work and their time
19 and it's my hope that the Board will continue to
20 operate unanimously whenever possible.

21 Now in today's meeting we will consider
22 seven matters and before turning to the business at

1 hand, let me just briefly describe the procedure that
2 we're going to follow today.

3 During the meeting, we'll consider each
4 case in turn. We'll hear a brief summary of the
5 matter from the Staff, with the Staff members
6 principally responsible for the case. Commissioners
7 will then have an opportunity to ask questions. And
8 once we've exhausted our questions, we'll turn to any
9 comments the Commissioners may have on the case and
10 vote on the draft decisions.

11 Now as a preliminary matter, let me say
12 how much I and the other Commissioners appreciate the
13 work of staff in making this voting conference a
14 reality. They've done a lot of hard and thoughtful
15 work on the cases that are before us today and as a
16 final reminder to those of you who are in the
17 audience, please turn off your cell phones, so that
18 they don't go off during the meeting.

19 With that, I'll keep my opening statements
20 short and recognize Vice Chairman Burkes for any
21 opening statement he may have.

22 VICE CHAIRMAN BURKES: Thank you, Mr.

1 Chairman. First of all, let me express my
2 appreciation to you and the Staff and to the other
3 Commissioner for being willing to change the voting
4 conference from yesterday to today, due to a death in
5 my family and I appreciate that very much.

6 I welcome everyone to this open, voting
7 conference, and I applaud the Chairman for holding it.
8 As Supreme Court Justice Lewis Brandeis once said,
9 "Sunshine is the best disinfectant" and most folks
10 perhaps would agree with it.

11 Since I've been on the Board, we've voted
12 on almost 700 cases. As you know, the majority of
13 those cases have been voted on by notation and
14 notation is a very efficient way to do it.

15 But it lacks dialogue and the open
16 exchange of views. Now as I sat down here a while
17 ago, I realized this is you from the hot seat, but the
18 hot seat may have shifted now slightly today, as we
19 interact and share our thoughts with each other.

20 The confidence that we place in our
21 Government is fundamental to a working democracy. I
22 believe the confidence is increased when the

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1 Government decision making is conducted in the open.
2 I look forward to this and future voting conferences
3 and other settings where we interact with the public
4 and specially those that we are here to serve.

5 Mr. Chairman, may I also express my
6 appreciation to the staff for the hard work that
7 they've done, not only in preparation for this voting
8 conference today, but as they do day by day and month
9 by month.

10 Thank you very much.

11 CHAIRMAN NOBER: Thank you very much.
12 Commissioner Morgan?

13 COMMISSIONER MORGAN: Thank you. Let me
14 just echo the comments that have already been made
15 about the work of the staff. Open meetings put an
16 extra burden on the staff and so I want to thank all
17 of the staff for the work that they put into today's
18 voting conference. And as I look at the list of cases
19 on our agenda today, it reminds me how good a shape
20 our docket is in here at the Board, and that's a
21 credit also to the staff here at the Board. So I want
22 to thank the staff for the state of the docket as we

1 move ahead.

2 With that, I'm prepared to move ahead.

3 CHAIRMAN NOBER: Okay, well, if there are
4 no further statements, we turn now to the matter
5 before us which is STB Docket No. 34178, the Dakota,
6 Minnesota & Eastern Railroad Corporation and Cedar
7 American Rail Holdings, Inc., Matter of Control versus
8 the Iowa, Chicago & Eastern Railroad Corporation.

9 Now Director Dave Konschnik is the head of
10 our Office of Proceedings and will coordinate the
11 staff briefings this morning.

12 Dave, will you please introduce the staff
13 members who will present this first case?

14 MR. KONSCHNIK: Yes, thank you and good
15 morning, Chairman Nober, Vice Chairman Burkes and
16 Commissioner Morgan. With me at the table for the
17 first proceeding to my right is Board's General
18 Counsel Ellen Hanson; to my left is Attorney Paul
19 Markoff of the Office of Proceedings; to Paul's left
20 Julia Farr, Chief Counsel, Office of Proceedings; and
21 to Julia's left, Michael Redisch, Associate Director
22 of the Office of Economics, Environmental Analysis and

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1 Administration.

2 For a number of the proceedings this
3 morning, including the first one, we have a map shown
4 overhead which indicates or shows the railroad line or
5 lines involved in the matter before you.

6 With that, Attorney Paul Markoff will make
7 the staff's opening presentation.

8 Mr. Markoff?

9 MR. MARKOFF: Chairman Nober, Vice
10 Chairman Burkes, Commissioner Morgan, this past August
11 29th, Dakota, Minnesota & Eastern Railroad Corporation
12 filed two applications with the Board: a merger
13 application that seeks approval for DM&E's acquisition
14 of control of Iowa, Chicago & Eastern Railroad
15 Corporation through dissolution of the voting trust
16 and the terminal trackage rights application that
17 seeks an order that would permit DM&E to operate
18 without restriction over a short segment of Union
19 Pacific Railroad track in Owatonna, Minnesota.

20 The draft decision before you includes two
21 main recommendations. First, the draft recommends
22 that the Board approve the merger application, subject

1 only to the standard New York dock conditions. Because
2 this merger does not involve two or more class 1
3 railroads, the relevant statute requires the Board to
4 approve the merger application unless there will be
5 adverse competitive impacts that are both likely and
6 substantial. Because these two railroads serve no
7 common industries and do not currently interchange
8 traffic at any location, this merger will not result
9 in any reduction in existing rail to rail competition
10 at any point or in any market. And no party has
11 demonstrated that any conditions are needed to
12 preserve competition.

13 Second, because the terminal trackage
14 rights sought by DM&E are neither necessary nor
15 appropriate to provide the full benefits of the
16 merger, the draft recommends that the Board deny the
17 terminal trackage rights and application.

18 In a proceeding that let to the Board's
19 approval last January of the construction by DM&E of
20 an Owatonna connection between its line and the line
21 now operated by IC&E, DM&E explained that the common
22 sense result would be to facilitate a private

1 agreement between itself and Union Pacific which would
2 obviate the need for construction in Owatonna. We
3 agree. Both DM&E and Union Pacific now have
4 incentives to negotiate an agreement under which DM&E
5 would be permitted to connect with IC&E via existing
6 Union Pacific trackage in Owatonna, the same result
7 that would be achieved if terminal trackage rights
8 were granted.

9 Because the real dispute between DM&E and
10 Union Pacific is likely to focus on the cost of this
11 connection, we think it appropriate to note that the
12 Board's well-established policy of encouraging private
13 sector dispute resolution whenever possible is
14 particularly applicable in disputes involving
15 compensation.

16 We'd be happy to take any questions that
17 the Board might have.

18 CHAIRMAN NOBER: Thank you for the
19 presentation.

20 Vice Chairman Burkes, do you have any
21 questions for staff?

22 VICE CHAIRMAN BURKES: Thank you, Mr.

1 Chairman.

2 Paul, I'm going to ask you a couple of
3 friendly questions. Most of my questions will be
4 friendly.

5 MR. MARKOFF: I hope so, yes sir.

6 VICE CHAIRMAN BURKES: Tell me, let's see,
7 this thing has been pending I guess they've been
8 trying to work out agreement for almost a year. And
9 you mentioned that they have an incentive to work out
10 an agreement.

11 Tell me what -- and I agree that DM&E has
12 an incentive. Tell me what you think the incentive
13 is?

14 MR. MARKOFF: On the PRB Construction
15 case, that's the Powder River Basin Construction case,
16 where the Board last January authorized for several
17 years while the environmental proceedings were
18 pending, last January the Board authorized DM&E to
19 construct a line of something like 280 miles into the
20 Powder River Basin. Part of that construction
21 authorization was a 1.7 mile connection just east of
22 Owatonna between the DM&E line and what was then the

1 I&M line is now the IC&E line. Until that
2 authorization of that 1.7 mile construction, DM&E
3 didn't have much of a leverage on Union Pacific. Now
4 DM&E does because DM&E can build that 1.7 mile
5 connection between its line and the IC&E line and
6 there will be a connection and if that happens, well,
7 DM&E's people testified in the PRB Construction case
8 that they didn't think that connection would ever
9 actually have to be built because once they had that
10 connection, they said, they would have the leverage to
11 go back to Union Pacific and say let's negotiate a
12 connection at the lines.

13 VICE CHAIRMAN BURKES: Paul, I agree with
14 that, but you're talking about something that is
15 probably way out into the future. Would that not be
16 correct? And based on how I read the case, DM&E
17 maintains 3.7 mile, whatever it is, connection now.
18 Plus they do the dispatching on it. But beyond that,
19 they're restricted as to what they can do. And I'm
20 trying to figure out what would be -- I can understand
21 why DM&E needs the connection, but I don't see where
22 there's any incentive for UP at this time.

1 Now if they have bulldozers out there to
2 start building the 1.7 mile track, I agree, that would
3 be a pretty good incentive.

4 MR. MARKOFF: Once they actually start
5 building it, DM&E will have less incentive to have a
6 deal because once they've started building it, they've
7 had to commit all that money in the process. It's
8 before they start building it that DM&E has the
9 incentive to negotiate and Union Pacific, the
10 incentive is that if they don't cut a deal with DM&E
11 for a connection in downtown Owatonna, DM&E is going
12 to have the connection of its own and Union Pacific
13 won't get pay anything for it. That's Union Pacific's
14 incentive to negotiate at this time.

15 Michael, do you want to --

16 MR. REDISCH: Well, that seems like the
17 reasoning that we used when we decided that there was
18 a sufficient incentive to bridge this gap through a
19 properly negotiated solution by the parties.

20 I know that there's some concerns that had
21 been raised, that if the Powder River Basin
22 construction does not take place, there will be a

1 limited incentive on DM&E's part to build this
2 connection that has already been authorized just for
3 the benefits of the common controller that we are
4 recommending that you authorize today. But it's
5 always hard to place yourselves in the minds and
6 hearts of business people. The application itself
7 says that DM&E is going to gain \$8 million of new
8 traffic from the common control application alone and
9 is prepared to rehab a line that they will be using.
10 That's going to cost \$3 million. It will be ready by
11 June so they're really not going to be ready to go
12 full blast until then.

13 Most of the gain that they're going to be
14 claiming is going to be new traffic from CP, not from
15 UP. So DM&E is going to be gaining a lot more than UP
16 will be losing.

17 MR. MARKOFF: In connection with that, Mr.
18 Vice Chairman, it's possible that DM&E would be
19 interested and willing to begin that construction
20 around Owatonna earlier rather than later in
21 connection with the line down in Mason City.

22 VICE CHAIRMAN BURKES: I understand they

1 can do that anytime they want to and we've proved that
2 through UP. But I'm just trying to pick out what
3 would be the downside of UP, if they worked out -- I
4 believe very strongly in private party agreements. I
5 think we all do, probably, here today. I'm trying to
6 figure out what is a downside of a delay in the effort
7 on UP to -- if the Board went ahead and authorized
8 apparently an amount of compensation isn't the issue,
9 is that correct?

10 MR. KONSCHNIK: That's correct.

11 VICE CHAIRMAN BURKES: So if the Board
12 went ahead and did something to move that forward, I
13 realize that we're stipulating that report back to us
14 within 60 days and we will also maintain jurisdiction
15 still and that would be a pretty good incentive to try
16 to work out something.

17 Is the downside for UP to go ahead and
18 arrive at some agreement in the interchange?

19 MR. MARKOFF: We think it's in both
20 parties interest to arrive at an agreement as early as
21 possible.

22 VICE CHAIRMAN BURKES: I would agree. But

1 it takes two to do that. And I don't know what all
2 interactions are taking place, as to why they've not
3 been able to do that up to now, otherwise, it wouldn't
4 be before us today, that part of it.

5 MR. MARKOFF: It's something that DM&E has
6 expressed optimism about before about negotiating and
7 we think they should be given that opportunity. We
8 think there are incentives on both sides and as you
9 indicate, we hope to have some good news for the
10 parties within 60 days and if not, we'll hear what
11 they have to say.

12 CHAIRMAN NOBER: Thank you. Commissioner
13 Morgan?

14 COMMISSIONER MORGAN: Just following up on
15 that discussion, it seems to me that your
16 recommendation reflects a preference in the first
17 instance for an attempt at a private sector
18 resolution.

19 MR. MARKOFF: Absolutely.

20 COMMISSIONER MORGAN: And I think the
21 60-day oversight period gives us the opportunity to
22 monitor the progress of the private sector

1 negotiations.

2 Now I would imagine that, with the 60-day
3 oversight period, the parties know that we are
4 watching what they are doing. And so I would expect
5 that could be some sort of added incentive for the
6 parties to try to make sure that private sector
7 resolution can work.

8 You don't need to necessarily comment on
9 that. That's my own view.

10 Now, just as an aside, DOT supports
11 negotiations in this case. Isn't that what they said
12 in the record?

13 MR. MARKOFF: That's right. They indicate
14 that there really wasn't a precedent for granting it
15 otherwise.

16 COMMISSIONER MORGAN: Thank you.

17 CHAIRMAN NOBER: Well, thank you very
18 much. If there are no further questions, we'll turn
19 now to the consideration of the proposed decision in
20 this matter and a copy is before each Commissioner.

21 Does any Commissioner wish to comment on
22 the draft? Commissioner Morgan just did.

1 I would just note that again, our draft
2 provides for a 60-day window for the parties to
3 negotiate a settlement and while there are -- the
4 record includes recommendations from both sides,
5 either grant the rights or not. Ultimately, when
6 DM&E's application for construction came in, they
7 indicated that they understood that this line was
8 owned by UP and that they were going to need to
9 negotiate for it and our draft takes account of that.

10 Well, if there are no further comments,
11 we'll proceed to a vote. I recognize the Vice
12 Chairman for a motion.

13 VICE CHAIRMAN BURKES: Mr. Chairman, I
14 move that the Board adopt the draft decision as
15 recommended by the staff.

16 CHAIRMAN NOBER: Is there a second?

17 COMMISSIONER MORGAN: I'll second. It's
18 pretty easy how this is going to go, isn't it?

19 (Laughter.)

20 CHAIRMAN NOBER: With that, the vote is on
21 the adoption of the draft decision. All those in
22 favor, say aye.

1 (Vote taken.)

2 The vote is unanimous and the decision is
3 approved.

4 We'll turn now to the next matter before
5 us which is STB Docket No. 33697, the National
6 Passenger Railroad Corporation, a Petition for
7 Declaratory Order in the Weight of Rail or the
8 Guilford case.

9 Director Konschnik who will present this
10 case?

11 MR. KONSCHNIK: Mr. Chairman, Attorney
12 Patrick Crawford from the Office of Proceedings will
13 be making the opening presentation. He has joined us
14 at the table, along with Jamie Rennert, an attorney in
15 the General Counsel's Office.

16 Mr. Crawford?

17 MR. CRAWFORD: Good morning, Chairman
18 Nober, Vice Chairman Burkes and Commissioner Morgan.

19 In the 1999 decision in this proceeding,
20 the Board required Guilford Rail System to permit
21 Amtrak to operate at speeds of up to 79 miles per hour
22 over a Guilford line in New England provided that

1 Amtrak rehabilitate the line to a certain track
2 modulus value. Track modulus is a measure of the
3 vertical stiffness of the track.

4 In the 2001 decision, we ordered Guilford
5 to allow Amtrak access to the line so it could test
6 the track to determine whether it had been
7 sufficiently rehabilitated. In that decision, we also
8 found that Amtrak's chosen testing methodology was
9 reasonable and practical.

10 Amtrak's testing demonstrated that 99.95
11 percent of the line had a sufficient track modulus
12 value. Nevertheless, Guilford has not accepted the
13 test results and has not allowed Amtrak to operate at
14 up to Federal Railroad Administration or FRA Class 4
15 speeds of 79 miles per hour. Therefore, in 2002,
16 Amtrak asked the Board to rule that in light of the
17 test results, sufficient rehabilitation had been
18 achieved and Guilford must allow Amtrak to operate
19 over its line at FRA Class 4 speeds.

20 Guilford argues that the testing was
21 unreliable and that its results are inaccurate. It
22 further argues that Amtrak has not complied with the

1 conditions of access that the Board imposed. In
2 matters of rail safety, we give substantial deference
3 to FRA which has significant expertise, experience and
4 primary responsibility regarding railroad track safety
5 standards.

6 In July and October 2002 comments, FRA
7 found that the testing was reasonable and that the
8 results were accurate. Because FRA is satisfied with
9 the testing process, the draft decision before you
10 proposes that the Board accept the test results and
11 order Guilford to permit Amtrak to operate at FRA
12 Class 4 speeds. If Guilford has safety concerns
13 regarding a specific section of track, FRA has
14 jurisdiction to consider that issue.

15 Finally, the Board's goal in these
16 proceedings has been to resolve matters related to
17 line access and rehabilitation and to allow safety
18 issues to remain with FRA. Because this goal has been
19 met, the draft decision before you also proposes that
20 the Board end its involvement in the matter and
21 discontinue this proceeding.

22 We would be happy to address any questions

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1 you might have.

2 CHAIRMAN NOBER: Well, thank you very
3 much.

4 Commissioner Morgan?

5 COMMISSIONER MORGAN: Just one question,
6 and then I'll make a comment. Throughout this
7 proceeding, is it not true that we have affirmatively
8 enlisted FRA along the way in every step where we
9 needed their safety expertise?

10 MR. CRAWFORD: Correct.

11 COMMISSIONER MORGAN: So clearly, the
12 recommendation that you're making today is a logical
13 extension of where we've been in this proceeding right
14 along, which is that we have resolved the issues that
15 are properly within our jurisdiction, having enlisted
16 the FRA to resolve those issues that are properly
17 within their jurisdiction.

18 Now your recommendation is basically
19 saying that we've done our work, and the rest is up to
20 FRA on safety issues. Is that an accurate description
21 of your recommendation?

22 MR. CRAWFORD: Yes, it is.

1 CHAIRMAN NOBER: Vice Chairman Burkes?

2 VICE CHAIRMAN BURKES: Thank you, Mr.
3 Chairman. Obviously, I was here when we voted on this
4 case in October, 1999. I admit at that time I didn't
5 know what, if any, jurisdiction we had over Amtrak and
6 this case points out, I think, that I seriously
7 question our authority to determine what the safety
8 issue is with Amtrak and I know that through Chairman
9 Morgan at the time, on the merger case that we started
10 cooperating with FRA and I think that's a good
11 position to take.

12 I'm assuming we're going to let FRA
13 address safety issues and we'll stick to the other
14 issues we have jurisdiction over. Would that be a
15 good assumption?

16 MR. CRAWFORD: Yes.

17 CHAIRMAN NOBER: Thank you. This is a
18 case where this is probably more of a comment than a
19 question, the ultimate issues that are before the
20 Board were whether or not -- what was the safe
21 operating speed for an Amtrak passenger train over a
22 given section of track, given the equipment that

1 operates. And that is the core mission of FRA and not
2 the mission of the Surface Transportation Board. I
3 came from DOT and I'm pretty familiar with the mission
4 of FRA and I've spoken to Administrator Rutter about
5 this matter. And from here on in we have, as staff
6 said and as Commissioner Morgan noted, we have
7 concluded our analysis of the economic relationship
8 between Guilford and Amtrak, that they've complied.
9 Now what the safe operating speed is for this, for
10 passenger service over this segment of track from here
11 on in should be treated the way any other mile or
12 segment of track is treated in the United States which
13 is that it's a safety matter, the inspectors will go
14 out. They'll review this, the condition of the track.
15 They'll review the equipment that's being used and
16 they'll come up with what a safe method of operation
17 is. And that that's where this dispute stands from
18 here going forward.

19 We've given them the right to operate at
20 79 miles an hour and from here on in, if Guilford or
21 Amtrak or any other party to this matter feels that
22 it's not safe to operate at that speed, they should

1 talk to the FRA and handle it in the normal process
2 because that's ultimately what this dispute comes down
3 to now.

4 So I thank the staff for their hard work
5 on this and there have been a number of cases, but
6 from here on in, this is a safety matter. FRA is the
7 agency that was set up for safety and has safety
8 expertise will handle it from here on in.

9 Well, why don't we proceed to the draft
10 decision? I recognized Commissioner Morgan for the
11 purpose of making a motion?

12 COMMISSIONER MORGAN: I move to adopt the
13 draft decision.

14 CHAIRMAN NOBER: Again, is there a second?

15 VICE CHAIRMAN BURKES: Mr. Chairman, I
16 second it.

17 CHAIRMAN NOBER: The vote is for the
18 adoption of the draft decision.

19 All those in favor say aye.

20 (Vote taken.)

21 The vote is unanimous and the decision is
22 approved.

1 Okay, thank you very much. And we turn
2 now to the next matter before us which is STB Docket
3 No. 33995, SF&L Railway, Incorporated, Acquisition and
4 Operation Exemption of the Toledo, Peoria and Western
5 Railway Corporation between La Harpe and Peoria,
6 Illinois and several related dockets.

7 Who will present this case?

8 MR. KONSCHNIK: Mr. Chairman, we've been
9 joined by Attorney Alan Weinstein of the Office of
10 Proceedings. And Attorney Cecilia Cannazzaro of the
11 Office of General Counsel. Mr. Weinstein will make
12 the staff's opening presentation.

13 Mr. Weinstein?

14 MR. WEINSTEIN: Chairman Nober, Vice
15 Chairman Burkes, Commissioner Morgan, good morning.
16 On appeal here is a decision of the Board issued on
17 October 17, 2002 in STB Dockets No. 33995 and 33996.
18 The decision revoked the previously issued exemptions
19 from regulation.

20 The first exemption allowed SF&L Railway
21 to buy the operating easement over and the rail ties
22 and certain improvements on a 71.5 mile rail line

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1 between La Harpe and Peoria, Illinois from the Toledo,
2 Peoria and Western Railway Corporation.

3 The second exemption allows SF&L's owners,
4 Messrs. Kern W. Schumacher and Morris H. Kulmer to
5 continue in control of SF&L after it became a rail
6 carrier.

7 The Board found that SF&L and its owners,
8 I will refer to them as Petitioners, had abused the
9 Board's class exemption procedures which are designed
10 to maintain railroad service, by using them to acquire
11 the line not for operation, but for salvage. In
12 reaching this conclusion, the Board found that the
13 acquisition had been structured to make the La Harpe
14 line unprofitable to operate and that this was to
15 facilitate the abandonment and salvage by one of
16 SF&L's corporate affiliates A&K Materials.

17 The Board therefore revoked the two
18 exemptions and ordered SF&L to reconvey its interest
19 in the line to TP&W. The Board also stated that it
20 would issue a decision in dismissing as moot the
21 petition for exemption to abandon the La Harpe line,
22 that SF&L had filed a month earlier in STB Docket No.

1 448 (Sub-2X).

2 On December 13, 2002, Petitioners'
3 requested reopening and reconsideration of the Board's
4 October 17th revocation decision. In the alternative,
5 they request a clarification. They claim that the
6 Board's decision contains material error and is
7 affected by changed circumstances. They argue that
8 the Board has no authority to revoke exemptions based
9 on abuse of Board processes and that the Board failed
10 to consider specific provisions of the Rail
11 Transportation Policy and make specific findings in
12 support of revocation.

13 The Board clearly has the authority to
14 revoke an exemption as necessary to protect the
15 integrity of the Board's processes and as the draft
16 decision before you explains, revocation here is in
17 keeping with the Rail Transportation Policy.

18 In short, the draft decision finds no
19 merits to these arguments and therefore denies the
20 petition to reopen and reconsider.

21 With regard to the Board's reconveyance
22 order, Petitioners claim that the line is worth more

1 than they paid for it. Thus, they assert that it is
2 not enough that TP&W refund the original purchase
3 price of the line.

4 To restore the status quo as it was before
5 this transaction took place, the draft decision
6 clarifies that TP&W must refund the original purchase
7 price, plus interest on that amount from the date of
8 the sale, December 29, 2000 to the date of
9 reconveyance, calculated in the manner set forth in
10 the Board's regulations at 49 CFR 1141(a) and (b).

11 Finally, the draft decision dismisses
12 SF&L's petition for an abandoned exemption in STB
13 Docket No. 448 (Sub-2X) and denies TP&W's motion filed
14 on October 30, 2002 to substitute itself for SF&L in
15 that proceeding.

16 We are prepared to answer any questions
17 you may have.

18 CHAIRMAN NOBER: Thank you very much.
19 Vice Chairman Burkes?

20 VICE CHAIRMAN BURKES: Mr. Chairman, I
21 think the draft decision speaks for itself and
22 properly so.

1 CHAIRMAN NOBER: Commissioner Morgan?

2 COMMISSIONER MORGAN: I only want to
3 mention that, in your comments, you talk about the
4 issue of the price for the line, and a reference to an
5 argument about some inequity here regarding what goes
6 back and forth in your recommendation. But aren't we
7 in essence here going back to square one? In other
8 words, we have found an abuse of our process and so
9 the remedy is to undo what we have done and go back to
10 square one. Is that, in essence, the decision?

11 MR. CRAWFORD: Exactly, that is the
12 decision.

13 COMMISSIONER MORGAN: Thank you.

14 CHAIRMAN NOBER: Okay. We have had other
15 filings in this case, as well, so while this is one
16 decision, it is not our last decision in this matter,
17 is that correct?

18 MR. CRAWFORD: Yes. It's more of an
19 ongoing --

20 CHAIRMAN NOBER: Well, if there are no
21 further questions, I will turn to consideration of the
22 proposed decision, a copy of which is before each

1 Commissioner.

2 Mr. Vice Chairman, I recognize you for a
3 motion?

4 VICE CHAIRMAN BURKES: Mr. Chairman, I
5 move we approve the case as recommended by the staff.

6 COMMISSIONER MORGAN: And I dutifully
7 second.

8 CHAIRMAN NOBER: The vote is on the
9 adoption of the draft decision.

10 All those in favor say aye.

11 (Vote taken.)

12 The vote is unanimous and the decision is
13 approved.

14 We now turn to the next matter before us
15 which is STB Docket No. AB-565, New York Central
16 Line's LLC, Abandonment Exemption in Lake County, Ohio
17 and related dockets.

18 Mr. Konschnik?

19 MR. KONSCHNIK: Thank you, Mr. Chairman.
20 We've been joined by Paralegal Specialist Josephine
21 Gomillion of the Office of Proceedings and Branch
22 Chief, Dave Nellen of the Office of Proceedings.

1 Ms. Gomillion will make the staff's
2 opening presentation.

3 Ms. Gomillion?

4 MS. GOMILLION: Chairman Nober, Vice
5 Chairman Burkes, Commissioner Morgan, good morning.
6 This case involves a petition filed jointly by two
7 rail carriers, New York Central Lines, LLC and CSX
8 Transportation, Inc. seeking exemptions for New York
9 Central to abandon and for CSX to discontinue service
10 over 2.5 mile rail line in Lake County, Ohio.

11 The only protest to the petition was filed
12 by Carmeuse North America which recently bought a lime
13 plant located on the line. Requests for public use
14 and interim trail use conditions was filed by Lake
15 Metro Parks, a political subdivision of the State of
16 Ohio.

17 There are two businesses located on the
18 line which have used rail services. These firms,
19 Morton Salt and Allegheny Niagara have used rail
20 service sparingly in the past few years. For prime
21 use, the sole protestant has never used rail service.
22 Morton Salt has shipped a total of 11 cars on the line

1 in the last three years with most of this traffic
2 moving by truck, rather than rail.

3 Allegheny has used rail service quite a
4 bit more than Morton Salt, shipping 88 cars of lime
5 by-products during the year 2000; 71 cars during the
6 year 2001; but as of October 15th no cars in the Year
7 2002. Allegheny does not own its own facility on the
8 line, so its production of line by products is
9 entirely dependent upon the operation of a line plant
10 located on the line.

11 This plant which primarily produced lime
12 to supply various steel operations was shut down in
13 December 2001. The protestant, Carmeuse North America
14 recently acquired the lime plant from International
15 Steel Group. Although Carmeuse has reopened the
16 facility, it has not used rail service and rail
17 service apparently was not used by the facility's
18 previous owner either.

19 CSX states that the traffic on the line
20 does not cover the cost of this rail operation and
21 that is incurring an annual loss from its operations
22 of \$16,642. The railroad states that its total annual

1 losses which are operating losses, plus its
2 opportunity costs will be around \$23,000. These
3 forecasted losses assume that there would be no
4 traffic from either Carmeuse or Allegheny.

5 In its protest, Carmeuse states that it
6 does not want the line abandoned and has advised
7 Petitioners that it is considering shipping coal to
8 the facility by rail car as well as shipping lime from
9 the facility. That, in essence, is the record.

10 In our view, the Petitioners have
11 established that they are incurring losses on the line
12 and will continue to incur losses until they are
13 permitted to abandon it.

14 The line is carrying virtually no traffic
15 right now and as far as traffic levels in recent years
16 do not suggest that there will be any significant
17 traffic increases in the future. This assertion that
18 it might use the line in the future is speculative and
19 is not supported by any evidence.

20 Finally, if this line is abandoned all
21 three businesses located on it will have other forms
22 of service. In light of all these factors, we believe

1 that the Petitioners have satisfied a statutory
2 criteria for the grant of an exemption to abandon the
3 line. Requiring CSX to file a formal application to
4 abandon the line is not necessary to carry out the
5 rail transportation policy and the abandonment will
6 not be an abuse of market power.

7 Accordingly, the draft decision before you
8 grants the petition subject to environmental trail use
9 and public use conditions and the standard employee
10 protected conditions.

11 If you have any questions, we will be glad
12 to respond to them now.

13 CHAIRMAN NOBER: Thank you very much.
14 Commissioner Morgan?

15 COMMISSIONER MORGAN: I have no questions.
16 The presentation was quite straight forward.

17 CHAIRMAN NOBER: Vice Chairman Burkes?

18 VICE CHAIRMAN BURKES: Thank you,
19 Josephine for a good presentation. This sort of
20 reminds me when we had in my home state when I was
21 Commissioner there and we didn't have jurisdiction to
22 determine whether or not they could abandon the land,

1 but encouraged a lot of the shippers if you want to
2 keep the service, why don't you start using them? And
3 they said, Commissioner, we need to keep it active as
4 leverage against our trucking industry. We can get a
5 better rate from them. This looked like sort of a
6 case here that some primary protesters are not really
7 using the land, have not used it and obviously if the
8 output exceeds our intake at some point or another
9 it's going to become our downfall.

10 (Laughter.)

11 This looks like it might be one of those
12 cases.

13 CHAIRMAN NOBER: Well, if there are no --
14 I have no questions, so we turn now to consideration
15 of the proposed decision, a copy of which is before
16 each Commissioner.

17 If there are no further comments, I will
18 recognize Commissioner Morgan for the purposes of a
19 motion.

20 COMMISSIONER MORGAN: I move the Board
21 adopt the draft decision.

22 VICE CHAIRMAN BURKES: Mr. Chairman, I

1 second that motion that we adopt it by acclamation.

2 CHAIRMAN NOBER: Well, the vote is on the
3 adoption of the draft decision. All those in favor
4 say aye?

5 (Vote taken.)

6 The vote is unanimous and the decision is
7 approved. Thank you very much.

8 We turn now to the next matter before us,
9 STB Docket No. 34114, Yolo Shortline Railroad Company,
10 Lease and Operation Exemption in the Port of
11 Sacramento.

12 Who will direct the case?

13 MR. KONSCHNIK: Attorney Patrick Crawford
14 has rejoined us. He will make the opening
15 presentation. But I'd also like to introduce to Mr.
16 Crawford's left is Alice Saylor, Attorney in the
17 General Counsel's Office; and to Alice's left, Mark
18 Lerner, Branch Chief in the Office of Proceedings.

19 Mr. Crawford?

20 MR. CRAWFORD: Thank you. Again, good
21 morning.

22 In 2001, the Sacramento Yolo Port District

1 or Port, an industrial district in West Sacramento,
2 California granted to Yolo Shortline Railroad or Yolo,
3 a Class 3 rail carrier, exclusive operating rights on
4 a segment of the Port's trackage. Soon thereafter,
5 Yolo filed a notice of exemption to lease and upgrade
6 this trackage.

7 For a number of years, Union Pacific and
8 its predecessor had been operating on the trackage
9 under a lease agreement with the Port. Because the
10 operating rights Yolo had acquired from the Port were
11 exclusive, Yolo notified UP that after the one-year
12 notice period specified in the lease agreement, UP
13 must terminate its operations on the track.

14 In an attempt to avoid owner removal from
15 the track, UP has asked the Board to reject Yolo's
16 notice of exemption or to revoke Yolo's exemption
17 authority. In its petition to reject, UP claims that
18 Yolo's notice of exemption is misleading. It asserts
19 that the notice creates two false impressions: first,
20 that UP's removal from the line is voluntary; and
21 second that Yolo has direct access to the Port's
22 trackage.

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1 In response, Yolo maintains that it
2 accurately provided all information required by the
3 Board's class exemption. Yolo asserts that it does
4 not matter whether UP's removal is voluntary or
5 whether it has direct access to the Port trackage. In
6 its petition to revoke, UP claims that its removal and
7 a substitution of Yolo would harm UP, decrease
8 transportation efficiency and increase fees to
9 shippers in the Port.

10 In response, Yolo argues that the
11 transaction is routine, consistent with the public
12 interest, limited in scope and will not result in an
13 abuse of market power.

14 The draft decision before you with UP's
15 request for rejection, we conclude that Yolo's notice
16 contains no false or misleading information, nor did
17 Yolo omit any information that is required by the
18 Board's regulations.

19 The draft decision would also deny UP's
20 request for revocation. In our review, UP has failed
21 to show that Yolo's lease and operation of the Port
22 trackage are contrary to the public interest or that

1 the lease is not the type of transaction that the
2 exemption was designed to encompass.

3 Furthermore, Yolo's intent to remove UP
4 from the trackage has no bearing on Yolo's right to
5 lease and operate the trackage.

6 We would be happy to address any questions
7 you might have.

8 CHAIRMAN NOBER: Thank you very much.
9 Vice Chairman Burkes.

10 VICE CHAIRMAN BURKES: Mr. Chairman, I
11 wanted to ask Alice and Mark a hostile question, but
12 since they didn't do the presentation, I'm not going
13 to ask Mark one. I have no questions.

14 CHAIRMAN NOBER: Thank you. Commissioner
15 Morgan?

16 COMMISSIONER MORGAN: Just one comment,
17 which is that this case clearly involves some private
18 negotiations that have gone on involving the Port.

19 MR. CRAWFORD: Correct.

20 COMMISSIONER MORGAN: I think what your
21 recommendation reflects is that we are getting in
22 where our jurisdiction allows us to get in, but not

1 second-guessing private negotiations that have gone on
2 between parties outside our jurisdiction. Is that an
3 accurate assessment of the recommendation?

4 MR. CRAWFORD: Yes, it is.

5 COMMISSIONER MORGAN: Thank you.

6 CHAIRMAN NOBER: Okay, if there are no
7 further questions or comments, we'll turn now to
8 consideration of the proposed decision, a copy of
9 which is before each Member.

10 I now recognize the Vice Chairman for the
11 purpose of making the motion.

12 VICE CHAIRMAN BURKES: Mr. Chairman, I
13 move that we accept the recommendation of the staff
14 and approve the case.

15 COMMISSIONER MORGAN: I second.

16 CHAIRMAN NOBER: The vote is on the
17 adoption of the draft decision. All those in favor
18 say aye.

19 (Vote taken.)

20 The vote is unanimous and the decision is
21 approved. Thank you very much.

22 We turn now to the next matter before us

1 which is STB Docket No. 34304, the Burlington Northern
2 and Santa Fe Railway Company Trackage Rights Exemption
3 and the Portland and Western Railway.

4 Director Konschnik?

5 MR. KONSCHNIK: Thank you, Mr. Chairman.
6 We've been joined at the table by Attorney Melanie
7 Yasbin of the Office of Proceedings and Branch Chief
8 Rick Davis of the Office of Proceedings.

9 Ms. Yasbin will make our opening
10 presentation.

11 Ms. Yasbin?

12 MS. YASBIN: Good morning, Chairman Nober,
13 Vice Chairman Burkes and Commissioner Morgan. The
14 draft decision before you denies the motion to dismiss
15 that was filed by the Burlington Northern and Santa Fe
16 Railway Company in conjunction with the trackage
17 rights notice of exemption in this case.

18 BN-SF originally characterized the
19 trackage rights over 27.9 mile rail line between Bush
20 and Albany, Oregon as incidental to a lease
21 transaction that was filed by the Portland and Western
22 Railroad in STB Finance Docket No. 34255. However, a

1 decision served on December 12, 2002 in that case
2 questioned whether the trackage rights were incidental
3 to the transaction and suggested that the parties
4 submit a separate filing or demonstrate why a separate
5 filing is not necessary. As a result, on December 20,
6 2002, BN-SF filed a verified notice of exemption under
7 49 CFR 1180.2(d)(7) to obtain authorization for the
8 overhead trackage rights.

9 Then on December 23, 2002, BN-SF filed a
10 motion to dismiss the notice of exemption, arguing
11 that separate Board authorization is not necessary.
12 Replies in opposition to BN-SF's motion to dismiss
13 have been filed by John D. Fitzgerald on behalf of the
14 United Transportation Union and General Committee of
15 Adjustment and by the Brotherhood of Maintenance of
16 Way Employees. In its motion to dismiss, BN-SF
17 argues that it retained the trackage rights when it
18 leased the line to P&WR.

19 Alternatively, the BN-SF renews its
20 argument that the trackage rights are incidental to
21 the lease transaction.

22 The draft decision finds that BN-SF did

1 not retain its trackage rights as evidenced by the
2 language in the trackage rights agreement, the lease
3 agreement and P&WR's prior characterization of the
4 lease transaction and as verified notice of exemption
5 in STB Finance Docket No. 34255. Rather, this is a
6 grant back to trackage rights and separate
7 authorization is required and has been granted.

8 The case is cited by BN-SF in support of
9 its position, including Minnesota Northern Railroad,
10 acquisition and operation of Rail line, Incidental
11 trackage rights from Burlington Northern Railroad
12 Company, STB Finance Docket No. 33315 et al., where
13 the lease agreement specifically stated that BN-SF
14 reserve overhead trackage rights are distinguishable
15 from the facts of this case, where BN-SF did not
16 specifically reserve the trackage rights.

17 As to BN-SF's second argument, the
18 trackage rights here do not fall within the scope of
19 trackage rights, but have been deemed incidental to
20 acquisition and/or operation of the rail line. This
21 is not a grant back of trackage rights to a purchaser
22 or lessee by the seller for the assignment of trackage

1 rights to the purchaser or lessee to operate over the
2 line of a third party that occurs at the time of
3 acquisition or operation.

4 BN-SF suggests broadening the concept of
5 incidental trackage rights to include circumstances in
6 which a lessee agrees to grant overhead trackage
7 rights back to the lessor over the leased line. The
8 draft decision would not adopt the broader reading of
9 incidental trackage rights.

10 That concludes my statement and if you
11 have any questions, we'll be happy to answer them.

12 CHAIRMAN NOBER: Thank you very much.
13 Commissioner Morgan?

14 COMMISSIONER MORGAN: This decision is
15 completely consistent with precedent with regard to
16 how we handle trackage right?

17 MS. YASBIN: That's correct.

18 COMMISSIONER MORGAN: Thank you.

19 CHAIRMAN NOBER: Vice Chairman Burkes?

20 VICE CHAIRMAN BURKES: No questions, Mr.
21 Chairman.

22 CHAIRMAN NOBER: I have no questions and

1 if there are no further questions, we'll turn now to
2 consideration of the proposed decision, a copy of
3 which is before each Commissioner.

4 Commissioner Morgan?

5 COMMISSIONER MORGAN: I move to adopt the
6 draft decision.

7 VICE CHAIRMAN BURKES: And I second the
8 motion.

9 CHAIRMAN NOBER: The vote is on the
10 adoption of the draft decision. All those in favor
11 say aye.

12 (Vote taken.)

13 The vote is unanimous and the decision is
14 approved.

15 With that we turn to the final matter of
16 the morning which is STB Ex Parte No. 282, Railroad
17 Consolidation Procedures: Class Exemption for
18 Temporary Trackage Rights Transactions, a Notice of
19 Proposed Rulemaking to streamline our procedure for
20 looking at these.

21 Director Konschnik?

22 MR. KONSCHNIK: As you see, Mr. Chairman,

1 Mr. Crawford and Mr. Lerner have rejoined us.

2 COMMISSIONER MORGAN: Are you paying them
3 overtime for their --

4 (Laughter.)

5 MR. KONSCHNIK: They love all this work.

6 COMMISSIONER MORGAN: I'm sure they do.

7 MR. KONSCHNIK: Mr. Crawford will make our
8 opening presentation.

9 Mr. Crawford?

10 MR. CRAWFORD: Once again, good morning.
11 A rail carrier may acquire trackage rights over the
12 line of another rail carrier only if it receives the
13 authorization of the Board. The parties often acquire
14 this authority by filing a notice to invoke a class
15 exemption contained in the Board's rules. Those
16 trackage rights extend indefinitely.

17 Any carrier seeking to terminate those
18 rights must file an application or petition for
19 authority to discontinue operations.

20 In receive years, carriers have sought
21 trackage rights authority that expires after a finite
22 period of time. These requests for trackage rights of

1 limited duration have involved carriers whose own
2 tracks are under repair, who have a need to store rail
3 cars or make provisions for local service, who are
4 undergoing line relocation and rehabilitation projects
5 or who conduct freight, intercity passenger and
6 commuter operations.

7 Parties have sought these limited grants
8 of authority by filing individual petitions for
9 exemption. The Board has granted these requests on a
10 case by case basis. Given the Board's experience in
11 these individual cases, we believe that both rail
12 carriers and the public would benefit from and the
13 draft decision before you proposes a rule that
14 expressly provides a class exemption for authorization
15 of temporary trackage rights.

16 By statute, the Board must exempt a
17 transaction from the full regulatory process when it
18 finds that the regulation is not necessary to carry
19 out the rail transportation policy and either the
20 transaction is of limited scope or regulation is not
21 necessary to prevent an abuse of market power.

22 Individual approval of temporary trackage

1 rights proposals does not appear to be necessary to
2 carry out the goals of the rail transportation policy,
3 rather, we believe that exempting such proposals as a
4 class would promote the railroad transportation policy
5 by eliminating unnecessary pleadings, by facilitating
6 the process of line repair and maintenance and by
7 promoting coordination between rail carriers.

8 A class exemption for temporary trackage
9 rights transactions would also reduce the regulatory
10 uncertainty of the parties, facilitate the parties'
11 ability to reach agreement on temporary trackage
12 rights, reduce the filing fees required of carriers
13 seeking such rights and encourage more overall use of
14 trackage rights.

15 A rule exempting temporary trackage rights
16 proposals also appears to be of limited scope because
17 the Board is limited to a class of exempted
18 transactions. These trackage rights will be limited
19 in duration and the requirement of a written agreement
20 will ensure that the temporary trackage rights
21 agreement will be available.

22 In addition, we believe that regulation of

1 this class of temporary trackage rights is not
2 necessary to protect shippers from the abuse of market
3 power. Providing temporary trackage rights would not
4 reduce competition and temporary trackage rights
5 proposals that add no service on the line such as
6 those involved in overhead traffic merely maintain the
7 status quo among carriers and shippers on the line.

8 In implementing this rule, standard labor
9 conditions would be imposed on any carrier using this
10 class exemption and carriers using the exemption could
11 discontinue service at the end of the authorization
12 period, without the need to obtain a certificate or an
13 exemption from the Board.

14 We would be happy to address any questions
15 you might have.

16 CHAIRMAN NOBER: Thank you very much.
17 Vice Chairman Burkes?

18 VICE CHAIRMAN BURKES: Thank you, Mr.
19 Chairman, whoever picked up on this, I commend them.
20 Obviously, it should cut out some work the Board's
21 required to do, so any time that any of us see
22 something that will lighten the regulatory burden I

1 think would be good and I commend our folks for
2 picking up on this and I think it's good.

3 CHAIRMAN NOBER: Commissioner Morgan?

4 COMMISSIONER MORGAN: I'll just second the
5 Vice Chairman's remarks.

6 CHAIRMAN NOBER: Well, in 1996, Congress
7 directed the Board to review and streamline its
8 procedures wherever possible and I know Commissioner
9 Morgan was a leader in that during her tenure as the
10 head of the Board and I strongly support those
11 efforts. So this is a good opportunity for us to try
12 to streamline an otherwise overly bureaucratic process
13 and we hope that it can move to a final rule quickly.

14 If there are no further comments, we move
15 the adoption of NPRM.

16 Vice Chairman Burkes?

17 VICE CHAIRMAN BURKES: Mr. Chairman, I
18 move we adopt it.

19 COMMISSIONER MORGAN: I second it.

20 CHAIRMAN NOBER: The vote is on the
21 approval of the NPRM. All those in favor say aye.

22 (Vote taken.)

1 The vote is unanimous and the decision is
2 approved.

3 That was our final matter for the morning.
4 Again, I want to thank the Commissioners and staff and
5 all the public who came to the conference today and
6 everyone for their hard work in putting this together.

7 The next meeting of the Board will be on
8 February 27, 2003 at 10 o'clock in the morning when
9 we'll be holding a public hearing on Ex Parte 638
10 which relates to proposed expedited procedures for
11 major rate cases.

12 Now if there is no further business, the
13 meeting stands adjourned.

14 (Whereupon, at 10:57 a.m., the voting
15 conference was concluded.)

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CERTIFICATE

This is to certify that the foregoing transcript in the
matter of: Voting Conference

Before: Surface Transportation Board

Date: January 31, 2003

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.


